United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

76-1384

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

vs.

REV. ALBERTO MEJIAS, MANUEL FRANCISCO PADILLA MARTINEZ, HENRY CIFUENTES-ROJAS, JOSE RAMIREZ-RIVERA, ESTELLA NAVAS, MARIO NAVAS and FRANCISCO CADENA,

Appellants.

----------x

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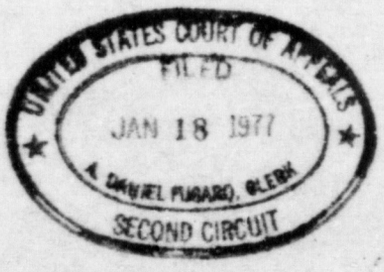
SUPPLEMENTAL APPENDIX

Appeal From A Judgement of Conviction
In the United States District Court
For the Southern District of New York



STUART R. SHAW
ATTORNEY AT LAW
600 MADISON AVENUE
NEW YORK, N. Y. 10022

(212) 755-3645
Attorney for
Henry Cifuentes-Rojas

PAGINATION AS IN ORIGINAL COPY

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

- against -

(ALBERTO MEJIAS) HENRY CIFUENTES-ROJAS,

Defendant.

NOTICE OF MOTION

76 CR 164 (RLC)

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SIR:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of STUART R. SHAW, ESQ., dated the 1st day of April, 1976 and upon all of the papers and proceedings heretofore had herein, the undersigned will move this Court before the Hon. ROBERT L. CARTER, at the United States Courthouse, Foley Square, New York, New York on the 2nd day of April, 1976 at 9:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard for the following pre-trial relief:

1. Severance of the case against the defendant so as to provide him with a separate trial from that of the other nine named defendants.

2. Severance of the trial of the defendant from that of any other defendant whose statements and/or admissions are to be introduced by the Government at trial, but which would be in violation of the exclusionary principle as set forth in Bruton v. United States, 391 U.S. 123 (1968), with respect to the

B1

defendant HENRY CIFUENTES-ROJAS.

3. Dismissal of the Indictment herein upon the grounds that the prosecution of the instant indictment sbjects the defendant to double jeopardy and double punishment on the basis of the Sixth Amendment to the United States Constitution and the due process clause of the Fifth Amendment to the United States Constitution, in that the charge of conspiracy of the indictment herein is, in law and in fact, the same conspiracy charge on which the defendant was previously indicted on in the New York State Supreme Court, County of New York.

4. An Order prohibiting the United States from using in evidence the fruits of any and all searches and/or seizures or electronic surveillance with regard to which the defendant has standing as an aggrieved party; which were secured in direct violation of defendant's rights under the Fourth Amendment to the United States Constitution; and pursuant to U.S.C. 18 U.S.C. §2510 et seq. In particular any and all evidence ruled suppressed by a New York State Supreme Court Judge after a lengthy hearing on a motion to suppress in State Supreme Court New York County decided in February of this year in the defendant's favor entitled to full faith and credit under the United States Constitution.

5. An Order granting to the defendant preservation of his rights under the Sixth Amendment and the Fifth Amendment to the United States Constitution, prohibiting the Government from

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using in evidence the fruits of any interrogation or identification of the defendant.

6. An Order directing that the Government provide the defendant with a Bill of Particulars of the Indictment, as set forth in Schedule I attached hereto (prior to the return date herein, the Court will be advised of any of the requested particulars to which the Government consents to supply to the defendant).

7. An Order directing the Government to provide the defendant with Discovery and Inspection as set forth in Schedule II attached hereto.

8. An Order granting that a pre-trial hearing be convened with regard to any presently unresolved factual issues necessary for the determination of the above requested items of relief, together with such other and further relief as to this Court may seem just and proper under the circumstances.

Dated: New York, New York
April 1st, 1970.

Respectfully yours,

STUART R. SHAW
Attorney for Henry Cifuentes Rojas
Office & P.O. Address
600 Madison Avenue
New York, New York 10022
(212) 755-5645 - PL 1-5200

To: Clerk of the Court
United States Court House
Foley Square
N.Y., N.Y. 10007

Hon. Thomas J. Cahill
U.S. Attorney's Office
1 St. Andrew's Plaza
New York, New York 10007

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

- against -

(ALBERTO MEJIAS) HENRY CIFUENTES-ROJAS,

Defendant.

AFFIDAVIT

76 CR 164 (RLC)

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

STUART R. SHAW, being duly sworn, deposes and says:

I am the attorney for the defendant HENRY CIFUENTES-ROJAS, and submit this Affidavit in support of the pre-trial relief requested in the annexed Notice of Motion.

HENRY CIFUENTES-ROJAS has been named as one of ten alleged conspirators in Indictment #76 CR. 164, a voluminous five count indictment filed in the United States District Court, Southern District of New York. The indictment was filed on an unknown date, but after a motion to suppress was granted to the defendants herein in a case in New York Supreme Court, New York County, brought on identical facts.

On information and belief the defendant, Mr. Rojas has been incarcerated since on or about September, 1974 when an indictment was filed in the New York State Supreme Court, County of New York. Said indictment charged Mr. Rojas along with other defendants with violation of New York State Narcotics Laws. Said

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New York State Indictment like the instant indictment included charges for narcotics violations. The defendant has therefore been incarcerated for over one year without having been afforded his right to a speedy trial.

Further, however, in accordance with the rule as stated in Bruton v. United States, 391 U.S. 123 (1968), the defendant also requests a separate trial from any defendant whose activities, statements, or admissions made or performed following the termination of the defendant's alleged membership in a conspiracy, will be introduced in evidence at a joint trial.

On information and belief as noted hereinabove, Mr. Cifuentes-Rojas was charged in New York Supreme Court with Narcotic violations of the State Law dealing with Narcotic drugs. He is now charged under the present indictment in the United States District Court for the Southern District of New York with conspiracy to possess and distribute narcotic drugs and with possession and distribution, in effect the identical acts charged in the State indictment.

It is submitted that the substance with which the defendant is charged as conspiring to distribute in the instant indictment is referred to as a Schedule I and II narcotic drug. In the New York State indictment the defendant is charged with conspiring to distribute narcotic drugs that would be identical to the federal classification of Schedule I and II. Thus, by their own lack of particularity, the two indictments State and Federal

B5

charge the defendant with the very same crime and thus subject him to double jeopardy in that regard.

On information and belief, the time period in which the alleged acts of the defendant were to have taken place in the State indictment is identical to the time period alleged in the second or instant indictment. Therefore without any question the time period covered in the first or state indictment is contained in the second or instant indictment. and the first (State) indictment's allegations are contained in the instant indictment.

In addition, the dates of the alleged overt acts of the first and second indictments cover the same time period.

If a conspiracy did take place, as the instant indictment alleges, surely it must have been the identical conspiracy alleged to have been in existence and charged in the first (State) indictment.

Therefore, on the grounds that the time periods stated by the two indictments, and the substances alleged to have been involved in each of the indictments (State and Federal) are identical throughout, the defendant requests that the indictment herein be dismissed as it obviously and patently subjects defendant to double jeopardy and double punishment, in violation of his constitutional rights.

The defendant does not know whether or not the Government intends to introduce into evidence the fruits of any search or seizure or electronic surveillance. In the event that the Government does intend to introduce such evidence at trial, or

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the fruits thereof, the defendant then moves to suppress same upon the general ground that statutory and constitutional requirements have not been complied with. Upon receiving more particular information from the Government, the grounds for this motion will be further specified and enunciated.

Finally, the defendant respectfully requests that a pre-trial hearing be held in order to resolve any of the above factual situations which may be in dispute. For it would, for example, be manifestly unjust to require the defendant to establish his claim of double jeopardy during the cross-examination of a witness at trial. Such a situation would be overtly prejudicial to the defendant.

As for the defendant's request for a bill of particulars each item is specifically intended to assist him in his defense at trial and in his examination of trial witnesses. It is especially important that the defendant have such information as many of the alleged events occurred a number of years ago, the defendant has been incarcerated during a substantial portion of the time since the conspiracy is alleged to have existed, and additionally, a number of the charges have previously been leveled against the defendant in other jurisdictions.

Defendant has been supplied with no information as to the intentions of the Government regarding the introduction at trial of evidence obtained by an illegal search, illegal interrogation or identification procedures. If the Government

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intends to introduce such evidence at trial, the defendant hereby moves for its suppression upon the ground that constitutional and statutory procedures have not been complied with. Upon particularization by the Government, pursuant to defendant's motion for discovery and inspection, this motion will be further specified and enunciated.

For the same reasons as advanced in regard to the bill of particulars herein, the defndant should be granted discovery and inspection as requested in the annexed motion papers.

WHEREFORE, it is respectfully prayed that the pre-trial relief as requested in the annexed notice of motion be in all respects granted by this Court.

Dated: New York, New York
April 1st, 1976.

STUART R. SHAN

Sworn to before me this

day of 1976.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

(ALBERTO MEJIAS) HENRY CIPUENTES-ROJAS,

Defendant.

----------x

76 CR 164 (RLC)

SCHEDULE I - REQUEST FOR BILL OF PARTICULARS

1. The exact date, time and place that the defendant allegedly possessed contraband in Count #5 of the instant indictment;

2. The exact whereabouts of the contraband as alleged in Count #5.

3. The manner and mode of packaging of the contraband alleged to have been possessed in overt act #5.

4. The specific act, acts, or actions of the defendant alleged to have taken place in Sept. 3, 1974 as outlined in Count #5 of the instant indictment; specifically:

a. Who or whom allegedly possessed the contraband;

b. Who or whom allegedly distributed the contraband;

c. Who or whom allegedly handed over the contraband to another person; and who or whom were the persons to whom it was allegedly handed over.

5. Specify the Schedule II narcotic drug as alleged in Count 5; as to exact weight, purity, quality, etc.

6. The exact date, time and place of the alleged

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transfer of contraband as set forth in Count 5.

7. The exact purchase price of the contraband allegedly transferred as set fath in Count 5.

8. As specified in overt act #75, who or whom allegedly possessed the contraband; how was it purchased, what was the quality.

9. As specified in overt act #75, who or whom allegedly brought the contraband to said address and or removed it.

10. As specified in overt act #75, who or whom allegedly handed over the contraband to another person; and who or whom were the persons to whom it was allegedly handed over.

11. Where was Rojas when he allegedly called in overt act 64. Who else was present or prior to conversation if any one.

12. In overt act 65 where did Rojas allegedly tell Navas the price and who or whom was present if anyone besides Rojas and Navas.

13. Where were Rojas and Ramirez-Rivera during the alleged conversation in Overt Act 71.

14. What did they say.

15. Who else was present, if anyone,or prior to their conversation.

16. What was said during alleged conversation of overt act #76. Who else was present if anyone; or prior to their conversation.

17. How was the message sent in overt act #83. What

B10

was the exact massage. Where was the house of "Jane Doe"; where was alleged cocai stored in said house; how much was stored there allegedly; was it removed and if so when and to where was it moved.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

-against-

(ALBERTO MEJIAS) HENRY CIFUENTES-ROJAS,

Defendant.

----------x

76 CR 164 (RLC)

SCHEDULE II - REQUEST FOR DISCOVERY AND INSPECTION

I. ELECTRONIC SURVEILLANCE

Pursuant to Rule 16 of the Federal Rules of Cri
Criminal Procedure, the search and seizure provisions of the Fourth Amendment, the due process and self-incrimination clauses of the Fifth Amendment, and 18 U.S.C. §2510-2520, the defendant hereby moves this Court for an Order:

1. Directing the United States Government through the United States Attorney, to conduct a thorough investigation and to advise the defendant whether he, his premises, or premises under his direction and/or control have been the subject or target of electronic surveillance at the direction or under the supervision of any agency of the United States Government.

2. Granting the defendant discovery and inspection of any and all Court orders, recording tapes, notes, logs and/or transcripts with regard to any electronic surveillance disclosed under subsection (1) supra;

3. Granting that, to the extent that the disclosures requested under subdivision 2 is not granted, that all such material be produced for the inspection of the Court so that

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the Court can determine whether such material should be provided to the defendant.

4. Directing that all existing electronic surveillance, if any, which is not disclosed to the defense, be sealed and kept in safekeeping by the Clerk of this Court for the purposes of further review.

II. SEARCH AND SEIZURE

Pursuant to Rule 16 and 41(e) of the Federal Rules of Criminal Procedure, the search and seizure provision of the Fourth Amendment, and the Due Process and Self-incrimination provisions of the Fifth Amendment, the defendant hereby moves the Court for an Order:

1. Directing that the prosecution advise the defendant as to whether the Government, its agents, or anyone under its control, searched for and/or seized from the defendant or from any property under his ownership or control, any document or object, and to specify each such document and/or object as well as the circumstances of search and seizure.

2. Directing that the Government provide the defendant with an opportunity to copy and inspect any and all materials which were seized from the defendant as described above.

III. DISCOVERY AND INSPECTION

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the due process clause of the Fifth Amendment, the defendant requests discovery and inspection, including permission to copy or photograph the following:

1. Statements of Defendant - any alleged statements, admissions, or confessions, including (1) those in writing; (2) those since reduced to writing; or (3) otherwise preserved, regardless of whether such statement was obtained with the knowledge and consent of the defendant.

2. Statements of Co-defendants - all statements, admissions or confessions made by any co-defendant, whether reduced to writing or not, which tend to incriminate the defendant, in the possession of the Government or with due diligence can be found by the Government, which the Government intends to introduce at trial. This material should include any statements in the Government's possession now, or in the future that the Government may obtain, from prosecutions that Government has termed as related prosecutions. Specifically, the material from the related case tried before Judge Bonsal. Said case, terminated after 14 weeks of trial, was termed a related case on the record by A.U.S.A. Michael Carey.

IV. SCIENTIFIC TESTS

All results and reports of any scientific tests or experiments made in connection with this case are hereby requested by the defendant; and/or in the admitted related areas.

V. IDENTIFICATION

The defendant requests that the Government advise him as to whether or not it intends to offer in evidence the fruits of any eye-witness or voice identification. If so, provide the defendant with: (1) the date, time, place and type of each such identification; and (2) the name or names of the person or persons who made each such identification and of other persons who were present at each such identification.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA :

-v- :

MANUEL FRANCISCO PADILLA MARTINEZ, ET AL, :

Defendant :

- X

NOTICE OF MOTION

76 Cr. 154 RLC

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWARD CHASE, and upon all proceedings heretofore had herein, the defendant will move this Court at a Trial Term thereof, to be held at the United States Court House for the Southern District of New York, Foley Square, New York, New York on April 9, 1976, or as soon thereafter as counsel can be heard, for an order suppressing certain evidence and directing the return of property pursuant to Rule 41 of the Federal Rules of Criminal Procedure, and pursuant to 18 U.S.C. 2510(11), 2515, 2518(10)(a) and 3504 for an order suppressing the contents of any intercepted wire or oral communication or evidence derived therefrom. The defendants Meijas, CiFuentes-Rojas, Cadena, and Valenzuela respectfully request that they be allowed to join in these applications.

Dated: New York, New York
April 1, 1976

Yours, etc.,

WILLIAM J. GALLAGHER
Attorney for Defendant

By Edward T. Chase
Federal Defender Services Unit
The Legal Aid Society
15 Park Row 10th Floor
New York, N.Y. 10038

TO: ROBERT B. FISKE, Jr.
United States Attorney
Southern District of New York

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advantage over the accused the indictment should be dismissed

c. The evidence seized by arresting officers on September 3, 1974 should be suppressed.

A brief has been submitted by John Ciampa, Esq., counsel for the defendant Meijas. We will respectfully rest on the contents of that brief and the opinion in People v. Salazar, supra, with one exception.

That exception is that, because the State Court Judge has already determined the question of suppression principles of collateral estoppel and double jeopardy are raised. The State Court indictment has not been dismissed. Ashe v. Swenson, 397 U.S. 436 (1970); United States ex rel DiDiangiemo v. Regan, Dkt. No. 75-2094 (December 29, 1975, 2d Cir.)

CONCLUSION

The defendant Manuel Francisco Padilla Martinez and the other joined defendants respectfully conclude that for the reasons stated above the indictment should be dismissed and/or the evidence seized at the time of arrest should be suppressed.

Respectfully submitted.

WILLIAM J. GALLAGHER, ESQ.,
Federal Defender Services Unit
The Legal Aid Society
15 Park Row 10th Floor
New York, N.Y. 10038

EDWARD CHASE
OF COUNSEL

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

76 CR 164
(RLC)

- against -

HENRY CIFUENTES-ROJAS,

Defendant.

----------x

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affirmation of STUART R. SHAW, dated the 18th day of May, 1976 and upon all the papers and proceedings heretofore had herein the undersigned will move this court before the Honorable Robert L. Carter, at the United States Courthouse, Foley Square, New York, New York, in Room 318, on the 19th day of May, 1976, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard for the folbwing relief.

A hearing on a motion to suppress previously requested in motion papers filed by STUART R. SHAW on or about the 1st day of April, 1976, for an Order of this Court suppressing any and all evidence allegedly seized in regard to the arrest of the above-named defendant on the 3rd day of September, 4, in Apt. 6A, at 327 West 30th Street, New York, New Yor .

Dated: New York, New YYork
May 18th, 1976.

Yours etc.,

STUART R. SHAW
Attorney for Defendant
Office & P.O. Address
600 Madison Avenue
New York, New York 10022
(212) 755-5645

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TO:

HON. ROBERT L. CARTER
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

HON. ROBERT FISKE, JR.
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007
Attn: AUSA MICHAEL CAREY, ESQ.

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

- against -

HENRY CIFUENTES-ROJAS,

Defendant.

76 CR 164
(RLC)

AFFIRMATION

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

STUART R. SHAW, an attorney at law, duly admitted to practice in the Court in the State of New York, hereby affirms that the foregoing statement is true under penalty of perjury:

1. I am the attorney for the defendant appointed under the CJA Rules.

2. I make this Affirmation in support of the motion to suppress.

3. I made a motion to suppress originally on April 1, 1976.

4. I made a request for a Bill of Particulars with the above-named motion.

5. I did not receive the response to my Bill of Particulars until Thursday, May 13, 1976.

6. That I spoke to Michael Carey on the phone on Thursday and he admitted that the response to my Bill of Particulars was late and stated that there was still time to

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file motions.

7. That this Honorable Court stated that any and all motions made by other attorneys on this case would confer rights on co-defendants to make motions in the same regard.

8. I was loathe to make a motion to suppress for my client because of the fact that there may be a question as to standing. My client has told me through an interpreter that he was forceably taken to Apt. 6A, at 327 West 30th Street, New York, New York and that none of the contraband seized therein belonged to him.

9. Your affiant respectfully submits that my client's statements to me should be enough basis for this Honorable Court to order a hearing on the evidentiary question surrounding my client's arrest and because of the fact there was no warrant for his arrest or probable cause for his arrest.

WHEREFORE, your affiant prays that this Court hold a hearing for a motion to suppress and suppress any and all evidence seized at 327 West 30th Street, New York, New York, on or about September 3, 1974, and for such other and further relief as this Court deem necessary and proper and in the interest of justice.

Dated: New York, New York
May 18th, 1976.

STUART R. SHAW

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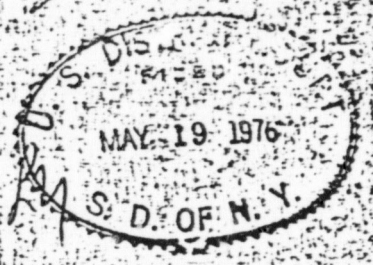
CARTER

Original



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

HENRY CIFUENTES-ROJAS,

Defendant.

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76 CR 164 (RLC)

BRIEF IN SUPPORT OF MOTIONS TO SUPRESS

Stuart R. Shaw, Esq.
Attorney for Defendant Ro
600 Madison Avenue
New York, N.Y. 10022
(212) 755-5645

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	76 CR 164 (RLC)
-against-	:	BRIEF IN SUPPORT OF MOTIONS TO SUPRESS
HENRY CIFUENTES-ROJAS,	:	OF DEFENDANT ROJAS
Defendant.	:	

The first issue that must be met by defendant Rojas is whether or not he has standing under the 4th Amendment of the United States Constitution to make a motion to supress the evidence illegally seized at apartment 6A at 327 West 30th Street on September 3, 1974, on or about or prior to 3:40 p.m. (see government's response to Rojas' Demand for Bill of Particulars 1.(1)* dated 5/11/76, received 5/13/76 in the afternoon, exhibit #1 attached hereto).

The Supreme Court held, on standing to move to supress, that defendants had no standing to object to the seizure of stolen goods from the premises of a co-conspirator. Brown v. U.S., 411 US 223 (1973). The Court laid down the general rule that there is no standing where defendants:

> "(a) were no on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." 411 US at 229.

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In New York, the latest case on this subject held that the law on standing is

> "In general, a person has standing under the Fourth Amendment when he (1) was legitmately on the premises at the time of the contested search, or (2) has a proprietary or possessory interest in the premises, or (3) was charged with an offense that includes, as an essential element of the offense charged, possession of the seized item at the time of the contested search, or (4) was the owner or possessor of the seized property (see Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed. 2d 208; People v. Hansen. ___N.Y.2d___, ___N.Y.S.2d ___, ___ N.E.2d___[dec. Oct. 30, 1975])/

Defendant Rojas is perplexed because of the fact that the entire issue of search and seizure was decided by Supreme Court Justice Coon in his two decisions dated February 2, 1976 and September 24, 1975 after extensive hearings (see exhibits A and B previously provided to this court as exhibits with Motion to Surpess dated May 14, 1976). Judge Coon decided that the defendant Rojas was not in the apartment at 30th Street (Exhibit A, p.5) as Rojas' affidavit (exhibit attached to Motion to Surpess dated May 18, 1976) and his New York State attorney's motion papers (attached hereto as Exhibit #2) stated.

Defendant Rojas relies on Judge Coon's decisions in the New York State Supreme Court as basis for a collateral estoppel argument; as a stare decisis, as the law of the case and on the law as an addendum to this brief on the issue of illegal search and seizure and on defendant Rojas' accompanying motion to supress

If this court finds Rojas has standing because of the fact that the aforementioned Government's Response to defendant Rojas' Bill of Particulars and because of Count 5 of the

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indictment and overt act #75 of the indictment, then defendant relies, as previously stated, on Judge Coon's aforementioned learned opinion and the law and cases cited therein. Rojas argues that under Terry v. Ohio, 392 U.S.L, 88 S.Ct. 1868, 20L.Ed. 2d 889, illegal "seizure" occurred when he was "arrested" outside the 30th Street apartment. That there was no valid basis under New York State law whereby that arrest and seizure could be upheld, because there was no valid warrant at the time of his arrest nor was the requisite probable cause present.

Under New York law, the locus of the arrest and subsequent search, the authority to arrest is statutory. See C.P.L. §140.10 and §140.25 (1,2). The people must establish probable cause. People v. Corrado, 22 N.Y. 2d. 308, 239 N.E.2d 526 and People v. Brown, 24 N.Y.2d 421, 248 N.E. 2d 867, hold that even a pattern of conduct of a defendant observed by the police mya be insufficient to form the basis for a warrentless search based on probable cause. The government in the instant case has not established a course of conduct by Rojas, nor flight (People v. White, 16 N.Y. 2d 270, 213 N.E. 2d 438, nor misstatements when questioned (People v. Brady, 16 N.Y. 2d 186 211 N.E.2d 815).

Rojas respectfuly requests that this honorable court take into account the language and rational of the court in U.S. v Costa, 356 F.Supp.606, 609 (D DC), aff'd 479 F.2d 921 (DC Cir 1973):

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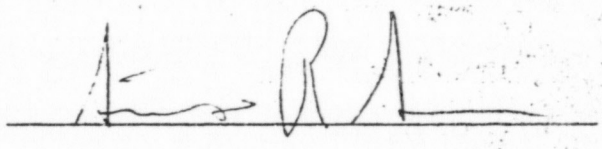
"The battle to rid society of illicit drugs must be won within the framework of our Constitution lest we achieve a pyrrhic victory. The streets must be rid of the pusher, but not at the expense of justice nor by compormise of individual liberty."

WHEREFORE defendant Rojas prays that this honorable court suppress any and all evidence the government attempts to introduce in regard to the September 3, 1974 search of his person and/or apartment 6A at 327 West 30th Street, New York, N.Y.

dated New York, New York
May 18, 1976

Respectfully submitted,



Stuart R. Shaw, Esq.
Attorney for Defendant
600 Madison Avenue
New York, N.Y. 10022
(212) 755-5645

To: Honorable Judge R.L. Carter
United States District Court
Southern District of New York

Robert E. Fiske, Jr.
U.S.Atty for the Southern District of N.Y.
Attention: A.U.S.A. Michael Q. Carey

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

UNITED STATES OF AMERICA

-v-

REV. ALBERTO MEJIAS, et al.,

Defendants.

BILL OF PARTICULARS

76 Cr. 160 (...)

---------------------------------------x

SIRS:

PLEASE TAKE NOTICE that the following is the Government's Bill of Particulars:

Henry Cifuentes Rojas

1. (1)* September 3, 1974, on or about and prior to 3:40 p.m., at apartment 6A, 327 West 30th Street, New York, New York.

2. (2) In apartment 6A, 327 West 30th Street, New York, New York.

3. (6) See paragraph 1, supra.

Alba Luz Valenzuela

4. (2) At approximately 4:45 p.m. on September 3, 1974.

5. (9a) At approximately 4:45 p.m. on September 3, 1974, Alba Luz Valenzuela, Francisco Padilla and Rev. Alberto Mejias.

6. (9c) See paragraph 4, supra.

7. (9d) Total: Approximately [illegible] travelers checks and money orders [illegible] seized from persons arrested at the [illegible]

* Numbers in parenthesis refer to the corresponding paragraph number of the defendant's motion for a bill of particulars.

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EXHIBIT 1

CENTRAL NARCOTICS COURT
COUNTY OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

HENRY ROJAS,

Defendant.

NOTICE OF MOTION

Ind. No.

----------x

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of HENRY ROJAS, the defendant above named, duly sworn to on the 4th day of April, 1975, upon the Indictment and upon all the pleadings and proceedings heretofore had herein, a motion will be made on the 8TH day of ~~April~~ MAY, 1975, at Part A of the Central Narcotics Court, located at 111 Centre Street, New York, New York, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order to suppress certain evidence under Section 710.20 of the Criminal Procedure Law, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
April 11, 1975

JAMES W. [illegible]
Attorney for [illegible]
401 Broadway
New York, New York
(212) 431-[illegible]

TO: Hon. Frank [illegible]
Special Narcotics Prosecutor
26 Federal Plaza
New York, New York

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EXHIBIT 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ALBA LUZ VALENZUELA,
HENRY CIFUENTES-ROJAS,
et al.,

Defendants.

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76 CR 164 (PLC)

AFFIRMATION

IN SUPPORT OF MOTIONS OF ALL DEFENDANTS FOR SUPPRESSION OF EVIDENCE SEIZED AND AND FOR DISMISSAL DUE TO VIOLATION OF DEFENDANT'S RIGHTS TO A SPEEDY TRIAL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JEROME ALLAN LANDAU, being duly sworn, deposes and states; under penalties of perjury:

I am the attorney for the defendant ALBA LUZ VALENZUELA;

I submit this Affirmation on behalf of my client, Ms. Valenzuela; on behalf of Stuart R. Shaw, Esq., attorney for the defendant HENRY CIFUENTES-ROJAS; and on behalf of the attorneys for all other defendants herein;

Motions have previously been filed seeking the above relief and this Affirmation is submitted in conjunction and support of same;

The additional facts that we rely upon herein are the same as those stated by the Hon. Justice LISTON F. COON, Justice of the Supreme Court of the State of New York, County of New York, in his "DECISION ON MOTION TO SUPPRESS TANGIBLE EVIDENCE"

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signed on September 24, 1975; on the facts stated by JUSTICE COON in his "DECISION ON MOTION FOR LEAVE TO RENEW AND REHEAR", dated February 2, 1976; copies of both decisions attached herewith as Exhibits A and B respectively. Further reliance is upon statements of The Hon. STERLING JOHNSON, JR., Special Assistant District Attorney, City of New York, County of New York and Mr. LAWRENCE M. HERMANN, Assistant District Attorney (Of Counsel) as submitted to The Supreme Court of The State of New York, Hon. JUSTICE LISTON F. COONE, in their "PEOPLE'S MEMORANDUM OF LAW I_ OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER CONTROVERTING SEARCH WARRANTS DATED SEPTEMBER 3, 1974 AND SEPTEMBER 6, 1974, AND FOR AN ORDER SUPPRESSING PHYSICAL EVIDENCE OBTAINED PURSUANT THERETO," dated September 16, 1975. Reference is specifically to page 1 of said District Attorneys' Memorandum (copy attached herewith as Exhibit C). Further attention is drawn to the the "AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO RENEW AND REHEAR" submitted to JUSTICE COONS by MR. LAWRENCE M. HERMANN, Assistant District Attorney, dated December 9, 1975; specifically, page two (copy attached herewith as Exhibit D).

In his Affirmation of December 9, 1975 (supra) MR. HERMAN states under the penalties of perjury that on September 3, 1974, "at approximately 4:45 P.M., ...Detective Pallazzoto requested D.E.A. Special Agent Williams to see if Apartment 1-B, 445 West 48th Street had any rear exit or egress...and D.E.A. Special Agents Forget and Williams went to the roof of 445 West 48th Street..."

In their Memorandum of September 16, 1975, STERLING JOHNSON, JR. Special Assistant District Attorney and MR. HERMANN

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state that "The eavesdropping warrants were issued in furtherance of an investigation commenced in mid-1973 by the Office of the Special Citywide Narcotics Prosecutor and the New York City Police Department, assisted by the U.S. Drug Enforcement Administration and related agencies..." (underlining added).

The indictment herein acknowledges the arrest of the defendants on September 3, 1974. The sworn statements of District Attorney STERLING and HEPMAN mentioned above state that Special Agats of the U.S. Drug Enforcement Agency were present at that date. The indictment herein was secured by the United States Government during mid-February of 1976. Clearly the United States was involved in the investigation since mid-1973, was present at the defendants' arrest in September 3, 1974, and was at all times aware of the facts and circumstances alleged in the indictment herein.

The trial of the defendants has not yet started, despite the fact that they were arrested over TWENTY MONTHS (20) ago (emphasis added). This is a clear denial of their Constitutional rights to a speedy trial and a violation of the prompt disposition rule.

The defendant VALENZUELA has appeared at every single Court date in State and Federal Court and has been prepared and ready to stand trial on each of these dates.

The defendant ROJAS stated through an interpretor, on each of the above Court dates, that he wished to be tried immediately.

More facts would have been stated herin, but we have utilized this method due to the exigent circumstances brought

by the failure of the United States Attorney to respond to our motions prior to Thursday, May 13, 1976; also due to a telephone call received from the office of The HON. ROBERT L. CARTER on Thursday, May 13, 1976, advsing us to submit some form of papers if we wish to be included in hearings scheduled to begin on May 17 (Monday); and further, in reliance upon a telephone call received in the mid-afternoon of today, Friday, May 14, 1976 from MR. NATHANIEL ACKERMAN, Assistant United States Attorney, assisting MICHAEL J. CAREY, Assistant United States Attorney, in the prosecution of this matter. MR. ACKERMAN advised us that the United States Attorney's office now had it's responding papers concerning various motions of defendants. He further advised that the Government would probably be prepared to supply it's response to other defendants' motions by Sunday, May 16, 1976. It is again to be noted that Monday, May 17th the hearings on motions will begin. MR. ACKERMAN stated that he had the home telephone numbers of all defense counsel and that the Government would call defense counsel at their respective homes to advise when such additional Government responses to defense attorneys' motions are available.

As concerns the suppression motions, we would further point out that it is the Law of the State of New York which is controlling; that the Legislature of the State of New York wrote such laws and expressed it's intentions concerning it's Laws; that ; that it is the New York Constitution coupled with the U.S. Constitution and case law decisions based thereon that are binding herein. JUSTICE LISTON F. COON, A Justice of the Supreme Court of the State of New York, the highest

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Trial Court in The State of New Yo. , after more than six (6) weeks of formal hearings on this same subject matter, involving these same defendants, rendered his decision and Order suppressing such evidence (supra, copy attached-Exh.A herewith); and again on February 2, 1976 JUSTICE COON rendered his decision denying the Government's motion for leave to renew and re..ear (supra, copy attached herewith as Exhibit B). JUSTICE COON's decisions are a Stare Decisis and are therefore the Law of the case. The defendants and the Government were represented by counsel throughout.

Therefore, this Court must suppress the evidence and dismiss the indictment herein.

We are prepared to present oral argument to expand upon all of the above points.

We hereby renew any and all other motions made any and all defendants herein and request that any relief beneficial to any defendant inure to each and every other defendant, as previously reuled by This Court.

WHEREFORE, defendants pray that this Honorable Court grant the relief requested herein; specificaly, but not limited to, suppression of any and all evidence seized in violation of defendants' Constitutional Rights under the Sixth (6th) and Fourteenth (14th) Amendments to the United States Constitution and The Constitution of the State of New York; dismissal of the indictment herein for failure to comply with the United States Constitution and the prompt disposition Rules of the Second Circuit and the prompt disposition Rules of the State

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of New York, granting of all previous motions filed by any and all of the defendants herein; and for such other and further relief as This Court may deem necessary, proper and in the interests of Justice.

Dated: New York, New York
May 14, 1976.

JEROME ALLAN LANDAU, ESQ.
Attorney for ALBA LUZ VALENZUELA

401 Broadway - 22nd floor
New York, New York 10013

Dated: New York, New York
May 14, 1976.

STUART R. SHAW, ESQ.
Attorney for HENRY CIFUENTES-ROJAS

600 Madison Avenue - 23rd floor
New York, New York 10022

TO:

ROBERT D. FISKE, JR.
United States Attorney for the
Southern District of New York.
BY: MICHAEL Q. CAREY, ESQ.
Assistant United States
Attorney
One St. Andrew's Plaza
New York, New York 10007.

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY : PART E

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

FRANCISCO SALAZAR, et al., :

Defendants. :

DECISION ON MOTION FOR LEAVE TO RENEW AND REHEAR

LISTON F. COON, J.:

By a decision rendered on September 24, 1975, this court directed that certain evidence be suppressed in connection with the above criminal action. The acquisition of the evidence resulted from entries into two separate apartments.

The People now seek leave to reopen the hearing on grounds that certain testimony which could have been adduced on the hearing only came to the prosecutor's attention after rendition of the court's decision. Apparently one of the testifying detectives subsequently recalled certain events which the People feel would have resulted in a different determination by the court.

The basic events surrounding the search and seizure involving the affected apartment consisted of a warrantless entry for the purpose of "securing" the premises pending issuance of search warrants. The theory of the People was, and still is, that the entry was legally permissible on the grounds of "exigent

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Exhibit "B" (7)

circumstances". Based upon the evidence at the hearing, the court found that no sufficient exigent circumstances existed to warrant the procedures taken.

The proffered evidence the People now contend would have tipped the scales in the other direction consists of the following set of circumstances: On the day in question police officers were in the process of setting up a surveillance of the apartment. Two officers went to the roof of the apartment building where they were confronted by the building superintendent who demanded to know what they were doing. Forced to reveal their mission, the officers were reprimanded by the superintendent and were requested to leave.

The inference is that the superintendent was then likely to alert the lessee of the apartment and thus destroy the effectiveness of the surveillance. The moving affirmation of the People asserts, "At this point Detective Palazzoto decided he either had to restrain the superintendent until the arrival of the search warrant or effect entry to secure the apartment."

The motion is resisted by some of the defendants on a number of grounds. It is pointed out that this is not a question of newly discovered evidence not available to the People at the time of the original hearing since Detective Palazzoto testified at length therein and the evidence now offered was certainly available to him at the time.

Aside from any procedural impairment to granting the requested relief, what the court finds strange is that from the

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"B" (2)

beginning the People were claiming exigent circumstances. Yet the exigent circumstances now claimed by the People with respect to the apartment in question never surfaced at the hearing.

Going back to the hearing, what the court interpreted as the theory of the People on the issue of exigent circumstances was something entirely different; i.e., the arrest of two of the defendants in Queens.

But even assuming that the evidence now sought to be admitted on a re-hearing had been produced on the original hearing the court would not have held otherwise. The court does not consider that the mere discovery of the police officers by the apartment superintendent constituted exigent circumstances, short of any indication that the superintendent was about to alert the occupant of the apartment.

There is no justification here to afford the People a second chance to succeed where once they tried and failed (See People v. Bryant, 37 N Y 2d 208).

The People's motion is, in all respects, denied.

J. S. C.

Dated: February 2, 1976
New York, N. Y.

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STANLEY STEVEN ZINNER

STATEMENT OF THE CASE

On August 15, 1974, the Honorable Thomas S. Agresta, a Justice of the Supreme Court of the State of New York, issued an eavesdropping warrant authorizing the interception of narcotics related conversations of Mario Rodriguez and Estela Bonilla, separately charged, and defendant Francisco Adriano Armodo Sarmiento, hereinafter referred to as El Mono, and their co-conspirators over the telephone in the newly leased apartment of Mario Rodriguez in Queens County. All telephone calls after August 15, 1974 hereinafter referred to were intercepted pursuant to said warrant. The eavesdropping warrant incorporated nine previous eavesdropping warrants issued between January, 1974 and July, 1974. Five of the previous warrants were issued by Justice Agresta on the telephones in the two prior Queens County residences of Mario Rodriguez. Of the four warrants issued by Justice Ernst Rosenberger in New York County, two authorized interception over the telephone in the apartment utilized during May and June, 1974 by defendant El Mono.

The eavesdropping warrants were issued in furtherance of an investigation commenced in mid-1973 by the Office of the Special City-wide Narcotics Prosecutor and the New York City Police Department, assisted by the U.S. Drug Enforcement Administration and related agencies. The essential purpose of the investigation was to uncover

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Exhibit "C"

warrant, that Detective Palazzotto attempted to recall what had prompted the precise time of his knocking at the door of the said 48th street apartment.

4. Detective Palazzotto informed me in mid-October of the following chain of events which he had not recorded in his detailed investigative reports nor remembered at the time of the hearing and which were not elicited at the hearing on direct or cross-examination: After observing the defendant Lejia exit a taxi and enter 445 West 48th Street September 3, 1974, at approximately 4:45 P.M., and preparatory to the arrival of a search warrant Detective Palazzotto requested D.E.A. Special Agent Williams to see if Apartment 1-B, 445 West 48th Street had any rear exit or egress which could be viewed fro street level. It could not be ascertained. Stationing New Jersey Detective Bucci in the hallway Detective Palazzotto and D.E.A. Special Agents Forget and Williams went to the roof of 445 West 48th Street. They were confronted by the superintendent of the building who stated he had been watching them for awhile and wanted to know their purpose. After learning the superintendent's identity, Detective Palazzotto identified himself and asked if Apartment 1-B had a rear door or rear windows. The super responded that there was a door and then harangued the officers for bothering the nicepriest who was his tenant. At this point Detective Palazzotto decided he either had to restrain the super until the arri of the search warrant or effect entry to secure the apartment. The officer accompanied the superintendent downstairs and after asking him to leave the ground floor, effected ent into apartment 1-B at approximately 5:10 P.M.

5. After receiving the information in paragraph 4 above, I requested the Chief Investigator of this Office to visit the superintendent of the subject 445 West 48th Stree

6. Chief Investigator Anthony Procino informs me that on November 5, 1975 he in terviewed the superintendent of 445 West 48th Street, Mrs. Elsie Piper, at apartment 2-D therein. Mrs. Piper stated she and her husband Leo, who passed away in May, 1975, had bee

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EXHIBIT "D"

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY : PART E

THE PEOPLE OF THE STATE OF NEW YORK :

-against-

FRANCISCO SALAZAR, FRANCISCO PADILLA, REV. ALBERTO MEJIA, FRANCISCO SARMIENTO, JOSE RAMIREZ, ALBALUZ VALENZUELA, HENRY ROJAS and ANTONIO LOPEZ,

Defendants.

DECISION ON MOTION
TO SUPPRESS TANGIBLE EVIDENCE

LISTON F. COON, J.:

This has been a combined hearing to suppress tangible evidence seized by police as a result of a series of events occurring on September 3, 1974. Some of the moving papers are in the form of a motion to controvert a search warrant but the thrust of the entire proceeding is to suppress items seized at two locations, one being Apartment 1B at 445 West 48th Street, Borough of Manhattan (hereinafter referred to as 48th Street) and the other being Apartment 6A at 327 West 30th Street, Borough of Manhattan (hereinafter referred to as 30th Street). The former apartment was regarded as being occupied by the defendant Mejia and the latter apartment was regarded as being "utilized" by the defendant Sarmiento (Mono) and one "Oscar" whose identity was not firmly established at the hearing. Also involved in the overall picture is a defendant known as Evangelista Navas Villabona a/k/a Mario Rodriguez and a defendant known as Estella Bonilla Nocua, a/k/a Estella Rodriguez, purportedly the common-law wife of defendant Navas. While there are numerous indictments pending against the latter two and while the original search warrant application involved their apartment in the Borough of Queens, they are not part of this proceeding. It

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might be added that another apartment in the Borough of Queens was involved in the search warrant application but the Queens warrants were not issued until September 4, 1974.

Following are the Court's finding of facts and conclusions of law.

Findings of Fact

For many months prior to September 3, 1974, there was an on-going investigation being carried out by the Special Assistant District Attorney of the Special Narcotics Parts of New York County and a combined task force of various law enforcement agencies. The investigation included the use of extensive court-authorized eavesdropping warrants, undercover agents, surveillance teams and informants. The aim was to identify and eventually arrest and prosecute individuals involved in large-scale trafficking of narcotics, principally cocaine, being conducted in the United States from the source of supply in Colombia, South America. As a result of the investigation literally dozens of persons were discovered to be enmeshed in the web of the cocaine traffic. Many persons were arrested and many others identified in an overall conspiracy in the cocaine trade. It developed that an organization existed with various persons holding certain levels of command in the multi-tiered operation. Other foreign countries were involved and persons moved in and out of the United States, some as couriers, or "mules", for the purpose of smuggling the drugs and some of the individuals regarded as among the "higher-ups" were seen and identified in this country. Among these was one Alberto Bravo, regarded as a top echelon principal.

Towards the end of August, 1974, the investigation was marching towards a climax. Some of the top people including Alberto Bravo and one Bernardo Roldan were no longer visible in

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the United States. From the wiretaps it appeared to police authorities and to the prosecutors that others were in the process of attempting to leave and that the large-scale operations at least were going to be curtailed.

A command decision was made "move in" on those regarded as the main traffickers and dealers. Search warrants were to be sought and arrests contemplated.

Very early in the morning of September 3, 1974, the operation went into "high gear". The District Attorney's office started to assemble the information for inclusion in the application for the search warrants, along with Detective Luis Ramos, who as one of the main principals of the investigation, had been working on the case for a long time. He furnished information gleaned from wiretap intercepts and surveillance reports over the past several days. He was in contact with other officers throughout the day and passed this information on to the prosecutors. Meanwhile surveillance was maintained of the 30th Street and 48th Street apartments. Special attention was given to ascertain the movements of the defendants Mejia and Sarmiento, as well as others deemed to be involved.

In the early morning of September 3, 1974, Police Officers Mulligan and Finley were detailed to go to Apartment 6B at 30th Street to set up a surveillance of Apartment 6A. This was accomplished by peering through a peephole in the door. By radio they were in touch with fellow officers outside the building. Beginning at around 2 p.m. considerable activity was seen and heard. Rustling of paper inside Apartment 6A and movement of furniture were heard. Persons were seen to leave the apartment carrying packages. These were wrapped so that no contents were visible. The information was communicated to the officers outside the building who reported that the persons did not exit the building with the exception of one Bello (arrested but not a defendant

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here). Mulligan and Finley deduced that narcotics were being moved but that it was to some other part of the building. This information was communicated to superiors, including Detective Manning.

Meanwhile Detective Manning was also involved in the surveillance of the defendant Mejia along with Lt. O'Shea and Detective Caracappa. In the vicinity of the 48th Street apartment Mejia was observed standing on a street corner. Navas (Mario Rodriguez) was seen to arrive in an automobile. He was carrying a red plastic bag similar to a shopping bag. They entered the building where Apartment 1B was located and then were seen to leave the building. Manning and the others then left the area but a Detective Palazzotto was advised of the events and told to set up a surveillance in the 48th Street area. He did not immediately see Mejia but his instructions were to notify his superiors if he saw Mejia. Although he had previously been told that he could arrest Mejia on charges of conspiracy, he did not have a specific instruction to do so at this point, it being somewhere around 2:30 p.m.

An event was then to take place which precipitated a whole new course of activity. The defendants Sarmiento and Ramirez were arrested on a street in Queens. A wave of consternation apparently swept those in charge of the operation. The search warrant application was not yet completed, let alone its presentation to a judge or issuance of any warrants. The fear apparently was that the arrest of Sarmiento might have been observed by a confederate who would communicate the same to those at 30th Street and 48th Street and that flight or at least disposal of any narcotics at those locations would take place. Sarmiento was arrested apparently shortly after 3 p.m.

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Orders went out to enter and secure the 30th Street apartment and Detective Palazzotto was directed to arrest Mejia sometime later at about 5 p.m. when he observed Mejia arrive back at his apartment building. The order was somewhat qualified in that he was told to effect the arrest if he "saw it fit."

At about 4 p.m. the 30th Street apartment was entered by police officers without notice to any occupant. Involved were a Sgt. Troglio, a Sgt. Geberth and Detective Manning. Troglio and G erth burst through a rear window covered by venetian blinds. The apartment door was opened by one of them to admit Manning. There were back-up officers with Manning including Detectives Caracappa and Rodriguez.

Inside the apartment was found the defendant Lopez. Shortly thereafter the defendant Rojas was arrested outside the building and brought to Apartment 6B and eventually to 6A. Inside 6A a preliminary search of the apartment was made by Manning. By visual observation he observed a brown paper bag containing money. He also opened two closets, saw packages deduced by him to contain narcotics and a bag containing two pairs of shoes with torn soles covered with a white powder. Nothing was touched and orders to merely secure the apartment pending arrival of a search warrant were followed out. Defendant Lopez was under arrest since custody was maintained over him.

As indicated, Detective Palazzotto observed the defendant Mejia at about 5 p.m. Mejia arrived at the apartment building in a taxicab accompanied by the defendants Padilla and Valenzuela. The entered the building carrying shopping bags. After a short period to set up security measures, Palazzotto went to Apartment 1A and knocked on the door. It was opened a few inches by Mejia. Palazzotto identified himself, showed his shield and told Mejia he was under arrest. A chain still held the door partially closed. As Mejia retreated several steps, Palazzotto

forced the door open, breaking the chain, and entered the apartment with gun drawn. Present were Mejia, Paddilla, Valenzuela and also the defendant Salazar. All were placed against the wal frisked and placed under arrest. On a bed was a large quantity of United States currency and a cardboard with names and figures on it.

Again, as in the case of 30th Street, the officers' orders were to secure the apartment pending arrival of a search warrant. No defendant was or would have been permitted to leave A preliminary search of the apartment was made for other persons and weapons. Later after being joined by Sgts. Geberth and Troglio, Detective Manning pointed out the red plastic bag he ha seen earlier. Nothing was seized except that around 7 p.m. the money lying open on the bed was started to be counted. Reports were made back to headquarters concerning the entry and the arrests.

Meanwhile, back at the command post at 26 Federal Plaz the search warrant application was still being prepared. This is manifest since the moving affidavit of Detective Ramos recites th entries into the 30th Street and 48th Street apartments. The typing of the warrant did not start until after 6 p.m. and was no finished until about 10 p.m.

Once ready for presentation the proposed warrants and supporting documents including appendices of wire-taps papers, were taken to the home of a Justice of this Court by Detective Ramos, as applicant, Assistant District Attorney Fishman and Officer Mulligan as driver of the vehicle. The group arrived shortly after 10:30 p.m. and after consideration by the judge, th warrants were signed in the area of 11 p.m.

Officers Ramos and Mulligan went first to the 48th Street apartment where the warrant was executed. The warrant for

the 30th Street apartment was then delivered and executed. The evidence seized is described on the respective returns and need not be detailed here.

Thereafter all of the arrested defendants were taken to 26 Federal Plaza and processed.

ISSUES

Because of the unique nature of the entries and arrests in this case, it is deemed appropriate to raise a number of legal issues confronting the court.

Was there probable cause for entering either of the apartments to make arrests, apart from the pending search warrant applications? Did "exigent circumstances" exist, as contended by the prosecution, for entering either apartment? Do police authorities have the right to enter and secure premises in anticipation of issuance of a search warrant? Assuming the right to secure premises pending issuance of a search warrant, how long may individuals be held incommunicado pending the arrival of the search warrant? Would the search warrants have been issued except for the data included in the moving papers already indicating the entries into the apartments?

CONCLUSIONS OF LAW

It is the court's conclusion that the real issue in this case is whether or not an interior area of a dwelling may be secured by the police and persons found therein detained--and to what extent--pending issuance of a search warrant.

The evidence adduced and as demonstrated by the People's theory is clear that the entries were not to arrest and search based upon "exigent circumstances" or upon probable cause because

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the orders were not to touch anything pending arrival of the warrants.

Furthermore, the defendants, once arrested, were not taken without unnecessary delay to a local criminal court for the filing of accusatory instruments as required by CPL 140.20. There is no question but what the individuals found in the apartments were under arrest since their freedom had been curtailed and they were not free to leave (People v. Shivers, 21 N Y 2d 118).

Although the doctrine of "exigent circumstances" for the purpose of warrantless entry and arrest is accepted in this State (People v. McIlwain, 28 A D 2d 711), its traditional application was not the motivation for the entries here. Assuming that it were, the doctrine would be inapplicable. None of the activities or observations at the 30th Street apartment provided the initial probable cause to effect arrests to which exigent circumstances, if present, would then apply. The facts were insufficient to raise the level of suspicion and equivocal behavior to probable cause (People v. Davis, 36 N Y 2d 280). The wrapping of paper and movement of furniture and the departure of persons carrying packages was as susceptible to innocent behavior as to culpable conduct (See People v. Brown, 24 N Y 2d 421). Exigent circumstances simply did not exist. The apartment was allegedly "utilized" by the defendant Sarmiento. He was already under arrest at a point some distance away, Until the apartment was entered and the defendant Lopez identified therein, there was no knowledge on the part of the police officers who, if anyone, was in the apartment. The arrest of Sarmiento on a public street did not create an exigent circumstance.

The case of People v. McIlwain, supra, is clearly distinguishable. There the police already had probable cause to arrest the defendant in the apartment when the "rustling about",

B 46.

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"moving about" and "toilet flushing" was heard. Equally distinguishable is People v. Frank, 43 A D 2d 691. A specific crime had already been committed and the police arrived a few hours after its commission. That the police were in possession of knowledge that extensive narcotics trafficking was going on among a large number of persons is granted but the evidence fails to show any knowledge that contraband was actually present in the apartment (People v. Floyd, 26 N Y 2d 558). As suggested in the latter case, the posting of officers outside the apartment would have sufficed, pending the arrival of a warrant. "The common thread of 'exigent circumstances' is something out of the ordinary and, in this regard, one of the factors always to be considered is that of a reasonable alternative" (People v. DeVito, 77 Misc 2d 463, 469).

Furthermore, in People v. Taggart, 20 N Y 2d 335, the Court of Appeals said, "To limit its use to exigent circumstances the police action was related to matters gravely affecting personal or public safety" and "not by the problems associated with the enforcement of sumptuary laws. . . . such as narcotics violations."

In light of the ultimate determination in this case, the court need not take up the question whether the entry into the 30th Street apartment was made without identification or notice of the purpose of the entry (See e.g. People v. Floyd, supra).

Turning now to the entry into the 48th Street apartment, that of the defendant Mejia, the court finds that probable cause existed to arrest the defendant for conspiracy. But again the basis for lawful arrest pales in light of what was actually done. The defendant was not removed on the basis of a conspiracy charge and arraigned. Rather the evidence adduced reverts to the real objective, to secure the apartment pending arrival of a search

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warrant. Thus the argument of probable cause appeals to this court more as a subterfuge or technical entry to cover the real purpose based upon the arrest of Sarmiento. For reasons stated above, the exigent circumstances argument by the People is not persuasive. The true purpose of the police is compounded by the fact that the other occupants were also arrested and detained on baseless grounds merely because they happened to be there. The quantity of money in mere plain view was, at the time, in no way possible of association with criminal conduct. It was, in law, innocent as Tommy Thumbs Pretty Song Book nursery rhyme, "The king was in his counting house counting out his money."

So we come back to the basic issue. When or for how long may a private dwelling area be internally secured awaiting arrival of a search warrant? We are not dealing with the delay and withholding of an inanimate object until a warrant can be obtained (See e.g., United States v. Leeuven, 397 U.S. 249).

Since there is no line of New York State cases on the subject, one must turn to the cases in the Federal field where case law is scarce.

The case of United States v. Griffin, 502 F. 2d 959, closely approximates the situation here. Having developed probable cause for seeking a search warrant, police agents went to secure one. But other officers forcibly entered the apartment and secured it pending arrival of the warrant. The entry was ma at about 5 p.m. and the warrant did not arrive until 9 p.m. The prosecution sought to establish right of entry based upon exigen circumstances in that there was danger of destruction of narcoti The court held against the government claim, indicating that the was no proof that anyone was in the apartment at the time of ent

Such was the case here in the case of the 30th Street apartment. Although persons were seen leaving the apartment, th is no proof that at the time of entry the defendant Lopez was therein.

There was substantial evidence that the defendant Mejia would be found in the 48th Street apartment and in fact opened the door at the officer's knock; and as previously stated there was probable cause to arrest Mejia for conspiracy. A similar situation obtained in United States v. Phillips, 497 F 2d 1131. The appellate court posed the question, "Assuming that the agents had probable cause to arrest Phillips, the question then becomes: was the entry into the building a valid entry?"

While the answer could well be in the affirmative if the sole object was to arrest Mejia for conspiracy, the court finds that that was not the true purpose but rather the purpose was to secure the apartment based upon claimed exigent circumstances pending arrival of the warrant.

The court finds that the arrest of Sarmiento did not give rise to the exigent circumstances which made either entry lawful. The police had no knowledge that either apartment contained contraband and no actual knowledge that contraband was being removed from the 30th Street apartment despite observations of a suspicious nature. Had that been the case there might have been probable cause to enter and arrest without a warrant (See United States v. Curran, 498 F. 2d 30).

The case of United States v. Rubin, 474 F. 2d 262, is distinguishable. In that case the police had definite knowledge that a statue containing hashish had come through customs and was trailed to defendant's garage. The police went to seek a search warrant. The defendant Agnes meanwhile emerged from the residence and became aware of police surveillance. He tried to evade the police and when apprehended at a gas station yelled out to the observers, "call my brother". This communicative statement created the court-approved exigent circumstances. As the court pointed out, "At this point police believed destruction imminent

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It is also worthy to note that in Rubin, the police abandoned their efforts to get a warrant once the entry was made.

The court believes that because and only because of the attempted alert given by the defendant Agnes, did the Rubin court hold as it did.

In the case at bar, the arrest of Sarmiento did not result in any overt act or attempt at communication. That the mere possibility existed in the minds of the police that the arrest might be observed by someone in a position to give warning and that warnings might be given, did not create an exigent circumstance justifying the intrusion.

The motions to suppress as to both the 30th Street and 48th Street apartments are granted.

Having determined as it has, the court need not consider the five and six hour delays between entry and arrival of the search warrants nor whether inclusion in the search warrant application of facts regarding the entries affected the decision of the Supreme Court Justice to issue the warrants.

During the course of the hearing, the People introduced evidence tending to show difficulty in presenting the search warrant application to a judge. The Justice to whom the application would have been made, considering the facts of the long-pending investigation, was not available. The Justice who actually did sign the warrants did so at his home late at night. This the court finds irrelevant. Officer Ramos' testimony is that the papers were not completed until about 10 p.m., long after the entries had been made. Had an issuing judge been immediately present when the last required document was complete, it would not affect the court's determination as here made.

J. S. C.

Dated: September 24, 1975
New York, N. Y.

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FINGER GOLDBERG ZINNER & FINGER
COUNSELLORS AT LAW
SILVER TOWERS
125-10 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415
(212) 228-5000

WILLIAM L. FINGER
JACK G. GOLDBERG*
HOWARD H. FINGER
STANLEY S. ZINNER

*MEMBER WASHINGTON D.C. BAR

NEW YORK OFFICE:
404 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10011
(212) 228-5000

ARLEN YALKUT
OF COUNSEL

RECEIVED
APR 14 1976
By Stuart R. Shaw

April 13, 1976

Stuart R. Shaw, esq.
600 Madison Avenue
New York, New York 10022

Re: Henry Cifuentes-Rojas

Dear Mr. Shaw:

I had previously advised you that I represented Mr. Rojas solely for the purpose of a bail reduction, subsequent to the granting of a motion to suppress in the State Court. I was not, nor am I now, in possession of any other papers aside from my own bail application papers. The papers you apparently want are in the possession, I believe, of Mr. James Randolf, Esq.

I am not in possession of any papers regarding federal charges against Mr. Rojas.

Very truly yours,

Finger, Goldberg, Zinner & Finger

By: Stanley S. Zinner
Stanley S. Zinner

SSZ/cb

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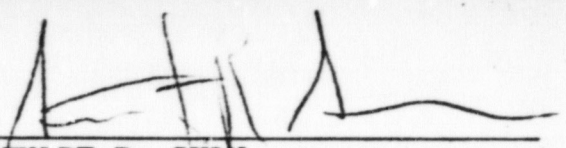
SRS:df

by 
STUART R. SHAW

Memo FROM: STUART R. SHAW

ATTORNEY AT LAW
600 MADISON AVENUE NEW YORK, N. Y. 10022 755-5645

TO:

Robert Zinner, Esq.
Finger, Goldberg, Zinner
& Finger
404 Avenue of the Americas
New York, New York 10011

DATE: 4/10/76

SUBJECT: HENRY CIFUENTES-ROJAS

FOLD HERE

I have not received from you to date the material in regard to the above named case as you promised. This letter is meant to serve as a formal demand that you turn over all the papers that you possess concerning my client to me immediately and all the papers you possess in regard to Mr. Salazar to me on behalf of Herbert Brown, his CJA attorney.

Sincerely yours,

cc: 125-10 Queens Blvd.
Kew Gardens, N.Y.11415
Suite 14

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Memo FROM: STUART [illegible] LAW

ATTORNEYS AT LAW

600 MADISON AVENUE NEW YORK, N. Y. 10022 755-0615

TO:

James W. Randolph, Esq.
17 John Street
New York, New York

DATE: 4/10/76

SUBJECT: HENRY CIFUENTES-ROJAS

[illegible] HERE

I understand you represented the above named man in State Court before you got your present job. Please contact me immediately in regard to said man because I need your State file!!

He is presently indicted in Federal Court!! His trial will begin no later than April 26, 1976.

Thank you.

P.S. I also need the investigator'snname on the case.